Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1390

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER,
Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC.
and FRANCIS W. SHEDD, Individually and on Behalf of
All Others Similarly Situated,
Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LAVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,
Appellees.

APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

APPELLANTS' BRIEF ON THE ISSUE OF MOOTNESS

VICTOR T. FUZAK, ESQ.,
1800 One M & T Plaza,
Buffalo, New York,
for
HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR,
Buffalo, New York,
and
ANDREWS, PUSATERI, BRANDT, SHOEMAKER, HIGGINS & ROBERSON,
Lockport, New York,
Attorneys for Appellants.

July, 1975.

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A. GERALD KLEPS, REPRESENTATIVE
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No. 74-1390

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,

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CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,

Appellees,

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JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LaVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,

Appellees.

Appeal from a Three Judge Court of the United States District Court for the Western District of New York.

APPELLANTS' BRIEF ON THE ISSUE OF MOOTNESS

The appellants request that this Court declare the issues in this proceeding moot, reversing and vacating the January 9, 1975 judgment with instructions on remand to dismiss.

Status of the Proceeding

The substantive facts of the case are recited in appellants' Jurisdictional Statement.

Appellants understood that respondents were proceeding to effectuate the 1972 Charter as provided in the January 9, 1975 judgment, specifically with respect to the inclusion on the November 1975 ballot of elections for the Charter-created positions of County Executive, County Comptroller and County Legislature. Since the validity of that judgment had not yet been passed upon by this Court, and because of appellants' concern that the proposed elections would thus lack the integrity necessary to proper elections, appellants applied to the District Court for an order staying enforcement of the judgment pending this appeal.[1] The District Court denied the stay, on the ground that the application might better be made to this Court.[2] The stay was denied despite the advice to this Court from the Niagara County officials by letter dated April 14, 1975 that potential qualified candidates would be dissuaded from seeking office under the Charter because of the pendency of the appeal.[3]

The papers submitted by respondents in opposition to the motion for stay indicated respondents were not proceeding to put into effect the 1972 Charter as required by the January 9, 1975 judgment, but were instead putting into effect a purported new County Charter which was the subject of a referendum held on November 5, 1974. The decision in this case was filed by the District Court on November 22, 1974.

[1] The papers submitted by the parties on that motion are annexed as Appendix 1.

[2] The District Court's Decision and Order are annexed as Appendix 2.

[3] See Appendix 1, page 15.

The proposed 1974 Charter contained the following explicit provision:

> "Section 101. *Title and Purpose.* This charter, together with any and all amendments hereto, if any, shall provide for and constitute the form of government for Niagara County, and shall supersede any and all other forms of government for the County of Niagara, including any charter previously adopted, and shall be known and may be cited as the 'Niagara County Charter' . . ."

At the November 5, 1974 referendum, the proposed 1974 Charter was placed on the ballot as follows:

> "Question Number One.
>
> "Shall Local Law No. 2 of 1974 providing for a change in the present form of county government to a charter form of county government be approved?"

The proposed 1974 Charter did not obtain the voter approval required by the New York State Constitution, Article IX, Section 1(h)(1), or New York State Municipal Home Rule Law, Section 33(7), since a majority of voters outside of the cities voted "No" on the question.

Prior to the entry of the District Court's January 9, 1975 judgment, respondents requested that the Court make the judgment applicable to the 1974 Charter rather than to the 1972 Charter, in order to provide that the 1974 Charter would be the "instrument defining the form of local government for Niagara County".[4] Since the case as filed, processed and decided dealt solely with the proposed 1972 Charter and the 1972 referendum, and neither the parties nor the Court had addressed themselves to the proposed 1974 Charter, and since there was at that time no case or controversy concerning the proposed 1974 Charter, the District Court properly refused

[4] See Appendix 1, p. 15.

the application. There were and are material differences between the two Charters.[5] The circumstances before, at and after the 1974 referendum were, of course, different than those appertaining in 1972.

The January 9, 1975 judgment, which is the subject matter of the pending appeal, dealt wholly and solely with the 1972 Charter, specifically providing:

> "3. The Niagara County Charter was duly adopted by a majority affirmative vote in the countywide referendum held on November 7, 1972 and
>
> 4. The county charter contained in Niagara County Local Law No. 1 of 1972 is in full force and effect as the instrument defining the form of local government for Niagara County and it is further
>
> ADJUDGED and decreed that the defendants are enjoined and directed to file and implement the Niagara County Charter set forth in Local Law No. 1 of 1972 for Niagara County which local law was the subject of a countywide referendum in Niagara County on November 7, 1972 and which local law was approved by a majority of the popular vote in such election."[6]

Instead of proceeding in accordance with the judgment and effectuating the 1972 Charter, respondents went through the motions of filing the 1972 Charter, at the same time filing the 1974 Charter, and thereafter proceeding to attempt to enforce the 1974 Charter as the "instrument defining the form of local government for Niagara County". At the time of oral argument of appellants' motion for stay, respondents Citizens for Community Action at the Local Level, Inc. and Francis Shedd acknowledged their agreement with and concurrence in the actions taken by the other respondents.

[5] See Appendix 3, Statement of Differences Between the 1972 and 1974 Charters.

[6] See pp. 20a and 21a, Appellants' Jurisdictional Statement.

Despite previous assurances and public statements that the New York State Attorney General would file and prosecute an appeal to this Court from the January 9, 1975 judgment, it was announced shortly before the expiration of the statutory appeal period that no appeal would be prosecuted. In view of this announcement, appellants obtained an Order to Show Cause on February 27, 1975, to gain intervention in order to process this appeal. On the next day, both the 1972 and 1974 Charters were filed by the Comptroller and the Secretary of State.[7]

On appellants' application for a stay of enforcement of the January 9, 1975 judgment, opposing papers were filed only by the Niagara County respondents. Those papers indicated and confirmed that the respondents had taken and were pursuing actions which had in effect destroyed the subject matter of this case, which would deprive the appellants from obtaining meaningful relief on this appeal, and which had rendered this proceeding moot.

Consequently, appellants moved the District Court for an order vacating its January 9, 1975 judgment on the ground that the respondents had rendered the proceeding moot.[8] After service of appellants' motion papers, appellants received copies of the "Reply to Jurisdictional Statement" filed by the Niagara County respondents with this Court. Point III of that Reply is entitled:

> "III. The question before the Court in regard to the 1972 Charter is now moot."

Despite the concession by respondents that this proceeding had become moot, the District Court denied appellants' motion to vacate in a terse decision, stating that the ap-

[7] See Appendix 4, Secretary of State Letters of Confirmation of Filing.

[8] Appendix 5 contains the papers filed on the motion to vacate.

plication was not within the purview of Federal Rules of Civil Procedure, Rule 60.[9]

To avoid being foreclosed from attacking the validity of the proposed 1974 Charter, by the four-month Statute of Limitations specified in New York Civil Practice Law and Rules, Section 217, appellants have been required to commence a special proceeding in the New York State Supreme Court to enjoin the respondents from attempting to implement the purported 1974 Charter. That action was commenced by service of Notice and Petition on June 27, 1975, and is now pending.

I. This Case Has Become Moot.

While questions of mootness frequently require difficult and close decisions, this case presents a unique and simple situation. Both appellants and the Niagara County respondents agree that the subject matter of the action has been extinguished and the case has thus become moot.

The specific and sole purpose of this action was to obtain an order enjoining and directing the Niagara County and State respondents to file and to certify Niagara County 1972 Local Law No. 1, providing for the adoption and implementation of a new charter form of government for the County. The subject matter of the action was the validity of the proposed 1972 Charter as put to referendum in November 1972. The judgment which is questioned on this appeal declared the 1972 Charter to be "in full force and effect as the instrument defining the form of local government for Niagara County".

The actions of the State and County respondents—fully concurred in by the respondents Shedd and Citizens for Community Action—have mooted the case. Respondents have at no time sought to implement the 1972 Charter. On the contrary, a new and different Charter which superseded any pre-existing Charter was purportedly adopted in 1974. All respondents are proceeding on the basis that the 1974 Charter is the instrument defining the form of local government for Niagara County. As a consequence, respondents have effectively destroyed the subject matter of this action.

[9] See Appendix 6, District Court Decision and Order, June 11, 1975, Denying Motion to Vacate.

By design or otherwise, respondents are attempting to insulate the decision and judgment of the District Court in this action by precluding the appellants from obtaining any meaningful relief on this appeal. For, if this Court should reverse the judgment and order dismissal of the complaint, the effect would be to declare invalid the 1972 Charter—which is no longer in existence and which respondents, in any event, are not seeking to enforce or implement.

A. The Constitution forbids judicial action except where a live controversy exists.

Article III, Section 2, of the Constitution requires as a condition to federal jurisdiction the existence of a live case or controversy. *Liner v. Jafco, Inc.*, 375 U.S. 301 (1964).

This Court's appropriate sensitivity to this jurisdictional prerequisite is clearly reflected in a number of recent mootness decisions. For example, in *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947), the Court declined to exercise jurisdiction and dismissed the appeal, stating at page 570:

> "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105. It has long been the Court's 'considered practice not to decide abstract, hypothetical or contingent questions . . . or to

> decide any constitutional question in advance of the necessity for its decision . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied . . .' " *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461. 'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.' *Burton v. United States*, 196 U.S. 283, 295."

In *Oil Workers Union v. Missouri*, 361 U.S. 363 (1960), the Court articulated its constitutional functions in the following language:

> ". . . the duty of this Court 'is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.' *Mills v. Green*, 159 U.S. 65, 653. See *Bus Employees v. Wisconsin Board*, 340 U.S. 416. To express an opinion upon the merits to the appellants' contentions would be to ignore this basic limitation upon the duty and function of the Court, and to disregard principles of judicial administration long established and repeatedly followed."

In the case at bar, respondents seek to take advantage of their own conduct in rendering the case moot by urging that their self-created mootness finalizes the January 9, 1975 judgment and deprives the appellants of any right to seek reversal of that judgment. The argument advanced is that the intervening mootness precludes this Court from exercising control over the lower Court's judgment. This is, of course, not the law, nor could it be if appellate rights and procedures are to have any meaning. The Court recently gave voice to the controlling principle in *Roe v. Wade*, 410 U.S. 113 (1973), where it said at page 125:

> "The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated."

In *Golden v. Zwickler*, 394 U.S. 103 (1969), an action had been commenced to obtain a declaratory judgment holding that a New York State law prohibiting anonymous election handbilling was unconstitutional. In reversing the District Court's determination that the prerequisites of declaratory judgment had been established, the Court held that the proceeding had become moot because the Congressman who was the target of the handbilling had taken a judicial position and would not likely be a candidate again.

In *Doremus v. Board of Education*, 342 U.S. 429 (1952), the Court held that a case involving prayer in public schools had become moot inasmuch as the child on whose behalf the suit had been commenced had graduated from school. The Court reasoned that any right the child may have had could not now be protected because she was no longer in school.

Any rights plaintiff-respondents had with respect to the implementation of the 1972 Charter have now passed, since that Charter has, with their concurrence, been extinguished and is not being implemented. There is no longer any live controversy in this proceeding.

B. This case does not fall within any of the recognized exceptions to the mootness doctrine.

The decisions of the Court indicate that there are three principal exceptions to application of the mootness doctrine. None of these exceptions has application here.

1. The Court has refused to dismiss for mootness where the question involved is "capable of repetition, yet evading review". See *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911).

The basic rationale for this exception appears to be that review should not be foreclosed by the fact that the time element involved in the questioned activity is so short that the activity under review is necessarily completed before the judicial procedure can be completed. This exception has no relevance to the instant case since the mooting events are not inherent in the situation (such as in cases relating to voting in a specific election, pregnancy and so on) but in fact are intervening voluntary actions by respondents. The constitutionality of the New York constitutional and statutory provisions are capable of being tested in a properly brought proceeding, involving an actual and live controversy, without mooting events occurring because of any inherent time limitation. The following cases indicate the type of situation in which this exception has application and indicate that it has no relevance to this proceeding. *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1975); *Storer v. Brown*, 415 U.S. 724 (1974); *Rosario v. Rockefeller*, 410 U.S. 755 (1973); *Roe v. Wade*, 410 U.S. 113 (1973); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Moore v. Ogilive*, 394 U.S. 814 (1969).

2. The Court has refused to dismiss for mootness where there are collateral consequences from the questioned activity. In cases such as *Mancusi v. Stubbs*, 408 U.S. 204 (1972), *Sibron v. New York*, 392 U.S. 40 (1968), and *Carasas v. LaVellee*, 391 U.S. 234 (1968), the Court held that even though the specific issue in the case had become moot, there were continuing consequences to the litigants which demanded review and resolution of the issues presented. Essentially, these cases involve circumstances where criminal sentences have been served but the collateral consequences flowing from the convictions give the parties a sufficient continuing personal stake in the matter to allow the Court to make a negative mootness determination. There are, of course, no continuing collateral consequences of the this nature stem-

ming from the purported adoption of the 1972 Charter or its abandonment by the respondents. In fact, respondents themselves urge that the 1972 Charter has been repudiated and superseded by the 1974 referendum and Charter. The result is that the 1972 Charter and referendum have passed from the scene, leaving no rights which now press for adjudication. What is now at issue is whether the purported 1974 Charter has been properly adopted and effectuated.

3. The Court has on occasion declined to dismiss for mootness where the defendant voluntarily discontinues the questioned activities. The Court has refused to reach a finding of mootness at a number of cases where the defendants have discontinued the questioned action, on the ground that there could be no assurance that the questioned activity would not be resumed once the judicial process had been terminated by the finding of mootness. This was the rationale for the exception when it was first applied in *United States v. W. T. Grant Company*, 345 U.S. 629 (1953). The same rationale was employed in the later decisions of *Mancusi v. Stubbs*, *supra*; *U.S. v. Concentrated Phosphate Export Association*, 393 U.S. 199 (1968); and *Gray v. Sanders*, 372 U.S. 368 (1963).

In the case at bar, the respondents have taken the position that the proposed 1972 Charter has been completely superseded, extinguished and replaced by the 1974 Charter. Respondents are not proceeding in any fashion to implement or to attempt to implement the 1972 Charter. Respondents advise the Court that no such effort will be made. In addition, the appellants who assert mootness have absolutely no ability and no intention to attempt to engage in the questioned activity raised in the proceeding as initially filed, that is, the implementation of the 1972 Charter. Accordingly, this exception has no application in this case.

C. Practical considerations support a determination of mootness.

The issues involved in any consideration of the constitutionality of Article IX of the New York State Constitution or of Section 33(7) of the Municipal Home Rule Law of New York are of far-reaching importance. At the date of this submission, 105 towns and villages in the state of New York had adopted formal resolutions of support for the position being taken by the intervening appellants in this action. The reasons for the inclusion of Article IX in the Constitution and for the passage of the municipal Home Rule Law, and the governmental justifications for the dual majority requirement with respect to changes in the form of local government, are of critical importance in assessing whether the Fourteenth Amendment has any application and in determining the propriety of the procedures adopted by New York State. Unfortunately, the present proceeding comes to the Court with an extraordinarily spare record. No testimony or evidence was adduced to establish the practical and governmental justifications for the New York State provisions. On the contrary, the judgment below is predicated on cross-motions for summary judgment without benefit of any factual presentation to establish that there is no unreasonable, "invidious discrimination" proscribed by the so-called one man, one vote concept. Adjudications of this magnitude should not be made in a factual vacuum. The issues and the Courts deserve substantially more in the way of a record with respect to a matter of such significance.

As the Court stated in *Socialist Labor Party v. Gilligan*, 406 U.S. 583 (1972), at page 588:

> "This Court has recognized in the past that even when jurisdiction exists it should not be exercised unless the case 'tenders the underlying constitutional issues in clean-cut and concrete form' *Rescue Army v. Municipal Court*, 331 U.S. 549, 584 (1947)."

In *Amalgamated Association of Street, Electric, Railway and Motor Coach Employees of America, Division 998 v. Wisconsin Employment Relations Board*, 340 U.S. 416 (1951), the Court made the following observations at page 418:

> "It is argued that the Wisconsin courts have adopted a practice of deciding questions of importance even though the case has become moot, and we are urged to follow that same practice. But whatever the practice in Wisconsin courts, 'A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it. *United States v. Alaska S.S. Co.*, 253 U.S. 113, 115-16, and cases cited; *United States v. Hamburg—American Co.*, 239 U.S. 466, 475-77.' *St. Pierre v. United States*, 319 U.S. 41, 42 (1943)."

Since the respondents have totally abandoned, and in fact have extinguished, the proposed 1972 Charter, a decision on this appeal would be an advisory opinion which would not affect the rights of the litigants with respect to the subject of the action.

In addition, there is a pending proceeding relating specifically to the propriety of the 1974 Charter, the referendum concerning it, and the actions of the respondents with respect to the 1974 Charter. It is anticipated that a full and complete record will be developed in that case concerning the justifications for the State constitutional and statutory provisions governing the adoption and change of local forms of government. As a consequence, if constitutional objections are again raised, the Courts will have a full and complete record dealing with a concrete case and a live controversy.

Since, as conceded by respondents, this proceeding has become moot, and since none of the exceptions to the mootness doctrine have application, it is submitted that the Court should adhere to previous rulings and declare the case to be moot.

II. The judgment below should be reversed and vacated, with directions on remand to dismiss the proceeding.

The governing principle regarding the consequences of mootness was stated in *U.S. v. Munsingwear, Inc.*, 340 U.S. 36 (1950), at page 39:

> "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss . . . that procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance."

The few decisions providing for remand with permission for amendment of the complaint, such as *Diffenderfer v. Central Baptist Church*, 404 U.S. 412 (1972), and *Spooner v. Littleton*, 414 U.S. 514 (1974), have no application here, since the District Court has already refused to deal with the 1974 Charter, and since the 1974 Charter is the specific subject of a pending proceeding before the Courts of the State of New York. See *Hall v. Bealls*, 396 U.S. 45 (1969).

Respectfully submitted,

VICTOR T. FUZAK, ESQ.,
Attorney for Appellants,
1800 One M & T Plaza,
Buffalo, New York 14203,
Telephone: 856-4000.

July, 1975.

APPENDIX 1.

Motion for Stay of Enforcement of Judgment

UNITED STATES DISTRICT COURT
Western District of New York

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LA VERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,

Defendants,

and

THE TOWN OF LOCKPORT, New York, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,

Intervening Defendants.

Civil 1973-222

This is a motion brought on behalf of the Town of Lockport and Floyd Snyder, intervening defendant-appellants, pursuant to Rule 18 of the Revised Rules of the Supreme Court of the United States, for an order staying and enjoining

the further enforcement of and actions pursuant to the judgment of this Court entered in the above-entitled proceeding on January 9, 1975, pending determination by the United States Supreme Court of an appeal filed on March 6, 1975 by the intervening defendant-appellants, and docketed with that Court on May 5, 1975.

The grounds of this motion are that actions should not be taken pursuant to the judgment of January 9, 1975 to implement the challenged Niagara County Charter until such time as the validity of that judgment and of the proposed Charter are determined by the United States Supreme Court, and that it would appear that by reason of the rules of the Supreme Court and its calendar, final determination of the appeal cannot be had prior to the time for the filing of nominating petitions for the proposed new positions of County Executive and County Comptroller, or before the holding of primary elections in September of this year, and, apparently, before the time for general elections on November 4, 1975.

PLEASE TAKE NOTICE, that this motion will be brought on for argument before this Court at 11 o'clock a.m., Monday, May 19, 1975.

s/ VICTOR T. FUZAK, ESQ.,
Attorney for Intervening Defendant-Appellants.
1800 One M & T Plaza,
Buffalo, New York 14203,
Telephone: 856-4000.

Dated: Buffalo, New York, May 9, 1975.

Affidavit in Support of Motion for Stay.

(Same Title.)

State of New York,
County of Erie. } ss.:

VICTOR T. FUZAK, being duly sworn, deposes and says:

1. I am the attorney for the intervening defendants, Town of Lockport and Floyd Snyder. This affidavit is made and filed in support of an application by the intervening defendants pursuant to Rule 18 of the Rules of the Supreme Court for a stay of the enforcement of the judgment of this Court entered on January 9, 1975 and a stay of further actions pursuant to that judgment by state and local governmental officials.

2. Rule 18 of the Rules of the United States Supreme Court requires that: "Whenever an appellant entitled thereto desires a stay on appeal, he may present for approval to a judge of the Court whose decision is sought to be reviewed, or to such Court when action by that Court is required by law, or, subject to paragraph 2 hereof, to a justice of this Court, a motion to stay the enforcement of the judgment appealed from . . ."

3. The judgment entered in this proceeding on January 9, 1975 provides: (a) that the Niagara County Charter was duly adopted by the referendum held on November 7, 1972; (b) that the said Charter is in full force and effect as the instrument defining the form of local government for Niagara County; and (c) that the local and state governmental defendants are enjoined and directed to file and to implement the Charter. Upon information and belief, the said governmental defendants have accepted the Charter for filing, are im-

plementing the Charter, and intend to proceed further pursuant to its terms despite the fact that an appeal from the judgment of this Court entered January 9, 1975 is presently pending before the United States Supreme Court.

4. The Town of Lockport and Floyd Snyder were granted permission to intervene as defendants in this proceeding on March 5, 1975, for the purpose of prosecuting an appeal from the January 9, 1975 judgment to the United States Supreme Court. The intervening defendants filed a notice of appeal on March 6, 1975. The intervening defendants have filed and served the required number of copies of jurisdictional statement to the United States Supreme Court within the time prescribed therefore by statute, that is, on or before May 5, 1975. All actions required to be taken to effect and to complete the docketing of the appeal with the United States Supreme Court have been timely accomplished. Under the rules of that Court, the appellees have until June 4, 1975 to file motion papers in opposition to the appeal. Under the rules of the Court, the jurisdictional statement will be presented to the Court by the Clerk upon receipt of such motion papers or June 5, whichever first occurs. The matter will be considered by the Court after that date. A copy of the jurisdictional statement accompanies this motion and is made a part of this application.

5. An immediate consequence of the implementation of the Charter, pursuant to the appealed judgment of January 9, 1975, is to create the new elective offices of County Executive and County Comptroller, and four-year as opposed to two-year terms for County Legislators. Deponent is advised and believes that petitions for primary elections for those positions will be circulated beginning June 16, 1975 and must be filed by July 14, 1975; that primary elections are scheduled to be held in September; and that the general elections with

respect to these positions would be held on November 4, 1975. Deponent has been advised by the office of the Supreme Court Clerk that the pending appeal will not be considered and determined until the October 1975 term of the Court, and that accordingly there is no assurance of a ruling, preliminarily noting jurisdiction, or finally disposing of the appeal, before November 4, 1975. On the contrary, it would appear that the appeal will not be determined prior to that date. It would appear therefore that actions pursuant to the challenged Charter will be taken, unless stayed, prior to the time that the Supreme Court will have an opportunity to rule on the pending appeal and on the validity of the Charter. It is submitted that the Charter should not be permitted to become effective or to prescribe the form of local government for the County of Niagara until such time as the Supreme Court has had an opportunity to consider and to rule upon the validity of the determinations of this Court that the provisions of Article IX of the New York State Constitution and of Section 33(7) of the New York State Municipal Home Rule Law are in violation of the Fourteenth Amendment to the United States Constitution. If a stay of the judgment of January 9, 1975 is not granted, and the Supreme Court declares that judgment to be invalid, the public tranquility and governmental processes of Niagara County will be violated by implementation of a Charter not adopted in accordance with existing state law. It is submitted that until the matter is finally determined, the proposed Charter should not be put into effect and elections for offices which will be nonexistent if the Supreme Court reverses the January 9, 1975 judgment should not be held.

6. Significantly, Niagara County government officials apparently concur in the view that the holding of elections pursuant to the proposed Charter, prior to a final ruling concerning its validity, would be inappropriate and disruptive.

On or about April 14, 1975, a letter was forwarded to the Clerk of the United States Supreme Court in reference to this proceeding, on the letterhead of the office of the County Attorney of Niagara County, and presumably from the Charter Committee of the Niagara County Legislature. A copy of this communication is annexed to this affidavit as Exhibit A. No copy of the communication was forwarded to deponent as counsel of record for the intervening defendant-appellants. Deponent learned of the existence of the communication from reports in the press and obtained a copy directly from the Clerk of the Supreme Court. Nevertheless, the communication verifies and concedes that election processes pursued under the questioned Charter prior to a ruling on the pending appeal by the Supreme Court would lack the integrity necessary for proper election procedures.

7. Accordingly, it is respectfully requested that a stay of and injunction against enforcement of, or actions under or pursuant to, the judgment of this Court filed on January 9, 1975, or under or pursuant to the Charter referred to therein, be entered pending final determination of the appeal in this matter to the Supreme Court, and that, pursuant to Rule 62(c) of the Rules of Civil Procedure, each of the three judges initially considering this matter assent to the entry of the order sought by this application.

s/ VICTOR T. FUZAK.

Subscribed and sworn to before me
this 9th day of May, 1975,
s/ Carole L. Zeiher,
Notary Public, State of New York,
Qualified in Erie County.
My Commission Expires March 30, 1976.

EXHIBIT A

Letter Dated April 14, 1975

Office of the
COUNTY ATTORNEY
of Niagara County
Lockport, New York 14094
Telephone 716 433-3857

April 14, 1975

Clerk
United States Supreme Court
United States Supreme Court Building
Washington, D.C. 20543

Re: Citizens for Community Action at the
Local Level, Inc., et al

vs. John J. Ghezzi, Secretary of State of the
State of New York, et al. and the
Town of Lockport, et al

Dear Sir:

We are writing this letter to respectfully bring to your attention and, hopefully, to expedite the above case which involves, among other things, the election of a county executive and county legislators for four year terms in the County of Niagara, New York, in the November 1975 election.

The State of New York has accepted the 1974 Charter for filing and if there is a September primary, petitions for nominating the county executive must be circulated this current June. While we are not restrained by the Court from so doing, those persons who desire to run for county executive are certainly disadvantaged by having to proclaim

their candidacy while the matter of the office of county executive is awaiting a final decision by the United States Supreme Court. In addition to spending huge sums of money for primaries and general elections, a person might leave current employment, or another elected office, in order to accept the position of county executive, only to discover that he or she has no job at all. We are reasoning, of course, that the Supreme Court could conceivably rule unfavorably after the county executive assumes office on January 1, 1976.

Since it is now April of 1975, it is obvious that those interested in running for county executive in Niagara County will not have the matter decided in time to be free of the worry of a Court decision. May 6, 1975 is the last day for the jurisdictional statement to be filed with the United States Supreme Court. After that, the United States Supreme Court must note probable jurisdiction before the time commences within which briefs and records must be filed. After probable jurisdiction is noted, the various litigants will have approximately sixty (60) days to file briefs and records before the Court will even consider a motion for advancement on the calendar.

It would therefore seem difficult at best for the United States Supreme Court to hear this case before October, 1975.

The Charter Committee sympathizes with the Towns of the County of Niagara if, in fact, they have reason to be concerned, in their worry over the possibility of annexation without the opportunity for the town populace to defeat such a move by the double referendum. At the same time, however, this committee, the majority of Niagara County voters and the Niagara County Legislature feel a county executive is needed.

Therefore, it is suggested that that part of the lawsuit dealing with an annexation possibility be decided by the Court and that the charter, as passed by the electorate of the County of Niagara, be adjudged to be valid so that no one has to contend for the office of county executive pending the outcome of a Court decision.

Very truly yours,

CHARTER COMMITTEE
NIAGARA COUNTY LEGISLATURE

s/ Leonard C. Gademsky, Jr.
Leonard C. Gademsky, Jr., Chairman

Legislator Donald P. Lane	Merton Marshall
Legislator Russell Parker	Lay Member
Legislator Doris D. Hampton	Clarence Gray
Legislator George G. McLane	Lay Member
Legislator Lee Simonson	Frank Moran
Legislator Wilfred G. Miles	Lay Member

MAL:mlc
cc: Senator Jacob Javits
Senator James L. Buckley
Representative John J. LaFalce
N.Y. Senator Lloyd H. Paterson
Assemblyman Matthew J. Murphy
Assemblyman John B. Daly
Honorable John T. Curtin
Niagara County Legislature
Niagara Gazette
Tonawanda News
Union Sun & Journal
Courier Express
Buffalo Evening News
Radio & TV media

Enc.

TO: NIAGARA COUNTY LEGISLATURE
FROM: CHARTER COMMITTEE
DATE: MARCH 18, 1975

WHEREAS, the Federal District Court for the Western District of New York has judicially approved the Charter enacted in 1972 for Niagara County, and

WHEREAS, the Secretary of State of the State of New York has accepted for filing both the 1972 and 1974 Charters for the County of Niagara, and

WHEREAS, certain persons have intervened in the lawsuit for the purpose of taking an appeal to the United States Supreme Court, and

WHEREAS, it is vitally important for the United States Supreme Court to expedite their decision in this matter because of the following:

(a) If a county executive is elected together with county legislators for four year terms, and if after those terms begin in 1976 the United States Supreme Court decides that the charter is invalid, then a situation would present itself in which the elected county executive would have his position dissolved and acts taken by the county executive and county legislators might later be held to be invalid, or in the alternative, the charter is later upheld by the United States Supreme Court after the time for filing designating petitions under the New York State Election Law, a situation would result where the county committees of various political parties might be making a parties' choice for county executive instead of having a full and open primary, as was intended by the charter committee, and

WHEREAS, a person elected to county executive whose position might be dissolved if an adverse decision by the

United States Supreme Court was rendered, said person would have given up his prior employment, perhaps as an elected official, to his detriment, now, therefore, be it

RESOLVED, that the Niagara County Legislature go on record as imploring the United States Supreme Court to use all possible speed in deciding this lawsuit, and be it further

RESOLVED, that a copy of this resolution be forwarded to the Clerk of the United States Supreme Court.

CHARTER COMMITTEE
MERTON MARSHALL
(Illegible Signatures)

(Illegible Signatures)

The resolution was adopted—March 18, 1975.

MAL:(Illegible)

Affidavit in Opposition to Motion for Stay.

(Same Title.)

State of New York, }
County of Niagara. } ss.:

SAMUEL L. TAVANO, being duly sworn, deposes and says:

1. That he is the County Attorney for the County of Niagara, and he is making this affidavit in opposition to a Motion for the Stay of Enforcement of Judgement of this Court entered January 9, 1975.

2. The Election to occur in November of 1975 for the office of county executive has nothing to do with the 1972 Charter approved by this Court. Subsequent to the Court's judgment, the County of Niagara duly filed a Charter which was approved by the voters on the 5th day of November, 1974 and filed by the State of New York, and which is now the official document for the governance of the County of Niagara. Since the judgment of the Court in regard to the 1972 Charter relates to a charter in the year 1972 and nothing more, this Court has absolutely no jurisdiction to prevent the County of Niagara from having a Charter government or holding elections pursuant to the Charter which was passed in 1974.

3. Furthermore, the County of Niagara applied to the Federal District Court for the Western District of New York to make the Court's ruling applicable to the 1974 Charter and was refused. (See letter dated December 19, 1974 annexed hereto and made a part hereof). If the Court refused that application because the validity of the 1974 Charter was not before the Court at that time, I fail to see how it can possibly stay the election scheduled for November of 1975 without the moving party commencing another action and asking for an injunction in regard to the 1974 Charter.

4. Annexed hereto and made a part hereof, is Page Four (4) of a Decision and Order entered by this Court which has the following language:

> "At the oral argument on March 3, 1975, an application was made for stay of the judgment previously entered. That application is denied with the concurrence of the other two panel members. Also, the intervenors furthermore represented to the court that the appeal would be pressed in an expeditious manner."

Your dependent fails to see any change of circumstance that would now make a stay of judgment applicable.

WHEREFORE, your deponent requests that the Motion For Stay of Enforcement of the Court's Judgment of January 9, 1975 be denied in its entirety.

SAMUEL L. TAVANO,
Niagara County Attorney.
Court House,
Lockport, New York 14094.

Sworn to before me this
15th day of May, 1975
Peggy A. Shea
Notary Public, State of New York
Qualified in Niagara County
My Commission Expires March 30, 19....

Letter Dated December 10, 1974.

December 10, 1974

Honorable John T. Curtin
United States District Judge
United States District Court
Western District of New York
United States Courthouse
Niagara Square
Buffalo, New York 14202

Re: Citizens For Community Action At The Local Level, Inc. et al

vs. John J. Ghezzi, Secretary of State of the State of New York, et al

CIV-1973-222

Dear Judge Curtin:

This letter is to set forth the position of the County of Niagara in the matter of settling the order in this action. Enclosed is a

certification of our Board of Elections showing that a charter was passed at the general election in 1974, and a copy of the Local Law with the certification of the Clerk of the Legislature and the County Attorney. The Local Law is the text of the charter passed in 1974. Also enclosed is a copy of the letter from the Secretary of State rejecting the filing of said 1974 charter.

We feel it would save much time, effort and money if the adjudgment of the Court could be amended to include the 1974 charter, allowing the State Attorney General's office to appeal from the 1972 charter passage and the 1974 charter passage. The 1974 charter contains a provision which indicates that it supercedes any and all other prior charters (see Article I, Section 101, 1974 charter).

I would suggest the Court could take judicial notice of the documents we now submit. It is also a possibility that we could proceed by way of stipulation. I will ask the other attorneys to stipulate to this method of entering judgment.

Very truly yours,

SAMUEL L. TAVANO
County Attorney

MILES A. LANCE
Assistant County Attorney

MAL:mlc
cc: John J. Phelan, Esq.
Michael G. Wolfgang, Esq.

Enc.

Page 4 of a Decision and Order.

and also the individual applicant's interest. The applicants, having fulfilled all of the requirements of Rule 24, shall be allowed to intervene in this action.

Although this application was made to the undersigned individually, before ruling upon it I conferred by telephone with Circuit Court Judge William H. Timbers and United States District Court Judge Harold P. Burke who concurred in my decision to grant an order of intervention.

At the oral argument on March 3, 1975, an application was made for stay of the judgment previously entered. That application is denied with the concurrence of the other two panel members. Also, the intervenors furthermore represented to the court that the appeal would be pressed in an expeditious manner.

It is so ordered.

JOHN T. CURTIN,
United States District Judge.

Dated: March 5, 1975.

Reply Affidavit in Support of Motion for Stay.

(Same Title.)

State of New York, }
County of Erie. } ss.:

VICTOR T. FUZAK, being duly sworn, deposes and says:

1. This affidavit is filed in response to the affidavit of Samuel L. Tavano dated May 15, 1975 filed on behalf of the Niagara County defendants, in opposition to the intervening defendant-appellants' motion for a stay of enforcement of this Court's order of January 9, 1975.

2. In connection with this matter, deponent has proceeded on the premise that the Niagara County and New York State governmental officials have acted in compliance with the judgment and order of this Court of January 9, 1975. The Niagara County Attorney's affidavit advises the parties and the Court that this has not been the case. The judgment and injunction of this Court dated January 9, 1975 specifically provided in part as follows:

> "4. The county charter contained in Niagara County Local Law No. 1 of 1972 is in full force and effect as the instrument defining the form of local government for Niagara County and it is further
>
> "ADJUDGED and decreed that the defendants are enjoined and directed to file and implement the Niagara County Charter set forth in Local Law No. 1 of 1972 for Niagara County which local law was the subject of a countywide referendum in Niagara County on November 7, 1972 and which local law was approved by a majority of the popular vote in such election."

Accordingly, the judgment of this Court is clear and specific in declaring that the Niagara County Charter set forth in Local Law No. 1 of *1972* for Niagara County ". . . *is* in full force and effect as the instrument defining the form of local government for Niagara County." This Court's judgment of January 9, 1975 specifically enjoins and directs the Niagara County and New York State governmental officials named as defendants in the action to file and implement *the Niagara County Charter which was the subject of the referendum held on November 7, 1972.*

It now appears that instead of complying with the explicit terms of this Court's judgment and injunction, the Niagara County and New York State governmental officials have proceeded to file and to attempt to implement another and different Local Law and another and different proposed Charter for the County of Niagara. The intervening defendant-appellants respectfully submit to the Court that the Niagara County and New York State governmental officials were without jurisdiction or authority to ignore and to refuse to proceed in accordance with the explicit terms of this Court's judgment of January 9, 1975, and that the purported 1974 Charter and Local Law may not be accepted or implemented by those officials.

3. Significantly, the Local Law and Charter which the Niagara County Attorney advises the Court has been filed and accepted by the Niagara County and New York State governmental officials was the subject of a referendum on November 5, 1974, two months before the Court's January 9, 1975 judgment was entered. As the County Attorney's affidavit indicates, a request was made by the Niagara County Attorney to have the January 9, 1975 judgment provide for the filing and implementation of the 1974 Local Law and proposed Charter, rather than to have that judgment and order apply to

the 1972 Local Law and proposed Charter. The Court refused this request ruling instead that "The county charter contained in Niagara County Local Law No. 1 of 1972 is in full force and effect as the instrument defining the form of local government for Niagara County . . ." and as stated above, directing the governmental officials to file and implement that 1972 Local Law as distinguished from the proposed 1974 Local Law and Charter.

4. The intervening defendant-appellants request therefore that this Court enter an order staying the implementation of its judgment and injunction of January 9, 1975, and further, that this Court enter an order declaring that the actions of the Niagara County and New York State governmental officials in filing and attempting to implement the 1974 Charter are contrary to and in violation of this Court's judgment and injunction of January 9, 1975, and enjoining and restraining those officials from in any way implementing or proceeding under or pursuant to the 1974 Local Law and proposed Charter. The Court has jurisdiction to enjoin violation of its order and judgment, and to stay the operation of that order and judgment.

5. The determination of the Court not to grant the oral application for a stay made on behalf of the intervening defendant-appellants at the time of agrument of the motion for intervention does not foreclose this application or preclude the granting of the relief sought. The oral application for a stay was not made on formal moving papers. The oral application for stay was made at a time prior to the entry of an order granting the intervening defendant-appellants the right to intervene and therefore standing to appeal before this Court and the Supreme Court. The facts as presently known, and as recited in the affidavit filed with the notice of motion in this application, support the good sense and necessity of

staying actions under any proposed new charter until the important constitutional issues determining validity are finally resolved by the Supreme Court.

s/ VICTOR T. FUZAK.

Subscribed and sworn to before me
this 16th day of May, 1975
s/ Carole L. Zeiher
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1976.

APPENDIX 2.

District Court Decision and Order Denying Motion for Stay.

(Same Title.)

Appearances:

Moot, Sprague, Marcy, Landy, Fernbach & Smythe (John J. Phelan, Esq., of Counsel), Buffalo, New York, for Plaintiffs.

Louis J. Lefkowitz, Esq., Attorney General, State of New York (Michael G. Wolfgang, Esq., of Counsel), Buffalo, New York, for Defendants Ghezzi and Levitt.

Samuel L. Tavano, Esq., Niagara County Attorney, Lockport, New York, for Defendants Graf and Comerford.

Hodgson, Russ, Andrews, Woods & Goodyear (Victor T. Fuzak, Esq., of Counsel), Buffalo, New York, for Intervening Defendants.

After considering the papers and the oral argument made by the intervenors, Town of Lockport and Floyd Snyder, I conferred with Judges William H. Timbers and Harold P. Burke. They concur with me that the motion for stay should be denied.

Under the circumstances, it appears that it would be more appropriate for the application to be made to a Justice of the Supreme Court.

So ordered.

JOHN T. CURTIN,
United States District Judge.

Dated: May 22, 1975.

APPENDIX 3.

Statement of Differences Between the 1972 and 1974 Charters.

ARTICLE II—LEGISLATIVE BRANCH

Section 202(a) *Powers and Duties*: 1974 Charter omits any mention of a Budget Review Officer who serves at the pleasure of the County Legislature as was provided for in the 1972 Charter.

Section 202(c): 1974 Charter here, as in other places, Section 208, Section 302(g), Section 311(a), Section 1602, the word "ordinance" is deleted.

Section 202(f): 1974 Charter the phrase "appointing officer" is substituted for "employing officer".

Section 202(k): 1974 Charter has grants general authority to create positions deemed necessary for County government; in the 1972 Charter this section was limited to the creation of deputy positions.

Section 205 *Filing and Publication of Local Laws; Judicial Notice:* 1974 Charter requires filing and publication as provided by the Municipal Home Rule Law or other applicable statutes; the 1972 Charter required compliance with Section 306 of the County Law.

Section 206 *Referendum:* 1974 Charter omits statement as in 1972 Charter that County Legislature may provide for referendum if not required by law.

ARTICLE III—EXECUTIVE BRANCH

Section 302 *Powers and Duties:* 1974 Charter, the phrase "supervise and direct" replaced the phrase "supervise and recommend" of the 1972 Charter.

Section 307 *Division of Central Services:* 1974 Charter omits the enumerated powers of County sealers of weights and measures as contained in the 1972 Charter.

Section 308 *Division of Economic Development and Planning:* 1974 Charter omits Sections 308 *Division of Research,* 309 *Division of Traffic Safety; Advisory Board,* and 310 *Division of Recreation and Related Programs,* as contained in the 1972 Charter.

Section 311(b) *Line Item Veto Power:* 1974 Charter sets a five day limit and requirement of two-thirds vote to restore a vetoed line item, in contract to no time limit in Section 313(b) of the 1972 Charter and a simple majority vote to restore a vetoed line item.

ARTICLE IV DEPARTMENT OF AUDIT AND CONTROL (1972): This Article of the 1972 Charter is entirely omitted from the 1974 Charter.

ARTICLE IV DEPARTMENT OF FINANCE (1974): (Article V, 1972 Charter).

Section 401 *Department of Finance; Commissioner; Election; Elective Office of Treasurer Abolished:* 1974 Charter provides for the election of a commissioner of finance for a four year term; the 1972 Charter, Section 501, provides for the appointment of the Commissioner of finance by the County Executive with confirmation by the County Legislature.

Section 402(c): 1974 Charter provides for the submission of reports to the County Legislature as the County Legislature may provide; the 1972 Charter requires in Section 502(b) that a general balance sheet be submitted on or before April 1 of each year to the County Legislature.

Section 402(e), (f), (g), (h), (i), (j), (k): 1974 Charter sets forth detailed functions of the commissioner of finance not contained in the 1972 Charter.

Section 403—*Division of the Department:* not contained in the 1972 Charter.

ARTICLE V—FINANCIAL PROCEDURES—1974 Charter (Article VII-1972 Charter)

Section 503 *Proposed Budget and Capital Program by County Executive:* 1974 Charter omits the provision that unencumbered balances should be treated as revenue for the ensuing fiscal year as provided for in the 1972 Charter, Section 703.

Section 505 *Review of Proposed Budget; Capital Program and Message:* 1974 Charter omits Budget Review Officer as a reviewer of the proposed budget as provided in the 1972 Charter, Section 705.

Section 507(b) *Adoption of Budget:* 1974 Charter states specifically that the line item veto power of County Executive applies to budgets adopted by the County Legislature; not provided for in the 1972 Charter, Section 707(b).

Section 507(e): 1974 Charter provides that the budget as formally adopted should be balanced; not provided for in the 1972 Charter.

Section 509 *Appropriations; Supplemental and Emergency:* 1974 Charter is phrased in general terms; the 1972 Charter, Section 709, specifically provides how the County Legislature must proceed.

Section 514 *Summary of Receipts and Expenditures,* and Section 515 *Independent Audit:* two additional sections included in the 1974 Charter but not present in the 1972 Charter.

Appendix 3—Statement of Differences Between the 1972 and 1974 Charters.

ARTICLE VII BOARD OF ACQUISITION AND CONTRACT—1974 CHARTER (Article IX—1972 Charter)

Section 701 *Board Created; Power and Duties:* 1974 Charter provides for the approval of County Legislature; not included in the 1972 Charter, Section 901.

Section 702 *Execution of Contracts:* 1974 Charter provides for award of contracts to low st responsible bidder if expenditure is in excess of ar ounts set forth in General Municipal Law or other applic..ole state law, requiring a copy of the executed contract to be filed with the commissioner of finance; the 1972 Charter, Section 902, sets the amount at "more than $2,500", requiring filing with commissioner of finance and the County Comptroller.

ARTICLE VIII—DEPARTMENT OF PUBLIC WORKS

Section 801 *Department of Public Works; Commissioner; Qualification:* 1974 Charter omits 1972 provision that parks department, if any, should be a division of public works, and continues this exclusion in remaining Sections 802 and 803.

Section 803 *Division of the Department:* 1974 Charter provides that division heads be appointed by commissioner of public works subject to County Legislature approval; the 1972 Charter provided that superintendent of each division should be appointed as presently provided by local law or resolution of the County Legislature.

ARTICLE IX—DEPARTMENT OF PARKS AND RECREATION: 1974 CHARTER

This entire article is new, and not contained in the 1972 Charter.

Appendix 3—Statement of Differences Between the 1972 and 1974 Charters.

ARTICLE XI—DEPARTMENT OF HEALTH—1974 CHARTER (Article XII-1972 Charter)

Section 1101 *Department of Health; Commissioner; Qualifications:* 1974 Charter provides that Commissioner be appointed pursuant to applicable state statutes, the 1972 Charter, in Section 1201, requires that the Commissioner be a licensed physician in New York State and experienced in public health administration.

Section 1104—*Sanitary Code*—1974 Charter empowers Board of Health to formulate and adopt health regulations; all provisions of the Niagara County Sanitary Code in effect at the time of the charter adoption to remain in full force. Under the 1972 Charter, Section 1204, the health board may recommend health regulations which the County Legislature may adopt; no provision for current Niagara County Sanitary Code to remain in effect. The 1974 Charter does not contain the 1972 provision for Sanitary Code to be published and filed.

ARTICLE XIII—DEPARTMENT FOR YOUTH—1974 CHARTER

New article not contained in the 1972 Charter.

ARTICLE XIV—DEPARTMENT FOR THE AGING—1974 CHARTER

New article not contained in the 1972 Charter.

ARTICLE XIV—DEPARTMENT OF ECONOMIC DEVELOPMENT AND PLANNING—1972 CHARTER

This entire article is omitted from the 1974 Charter.

ARTICLE XV—DEPARTMENT OF PERSONNEL

Section 1501, *Application of Article XV; Niagara County Civil Service Commissioner Continues; Civil Service Law to Apply:* 1974 Charter provides that the powers, duties and functions of the Civil Service Commission may be transferred to the Department of Personnel at the discretion of the County Legislature; no similar provision in the 1972 Charter.

ARTICLE XVI—DEPARTMENT OF LAW

Section 1601 *Department of Law; County Attorney:* 1974 Charter provides that the County Attorney be appointed by and term be the same as the County Executive; the 1972 Charter provides that the County Attorney be appointed by and term be the same as the County Legislature.

ARTICLE XVII—DEPARTMENT OF RECORDS

Section 1702 *Power and Duties:* 1974 Charter omits 1972 provision that County Clerk shall perform duties required or delegated to him by the County Executive or the County Legislature.

ARTICLE XVIII—DISTRICT ATTORNEY

Section 1802 *Powers and Duties:* 1974 Charter omits 1972 provision that District Attorney perform duties required or delegated to him by the County Executive or the County Legislature.

ARTICLE XX SHERIFF 1974 CHARTER (Article XIX—1972 Charter):

Section 2002—*Powers and Duties*—1974 Charter omits 1972 provision that Sheriff shall perform duties required or delegated to him by the County Executive or the County Legislature.

ARTICLE XXII OTHER COUNTY BOARDS, OFFICES, INSTITUTIONS AND FUNCTIONS—1974 CHARTER (Article XXI-1972 Charter):

Section 2202 *Probation Officer:* 1974 Charter provides for appointment under Section 256(5) of Executive Law of State of New York; the 1972 Charter, Section 2102, provides for appointment under Section 938-b of the Code of Criminal Procedure of State of New York.

Section 2207 *Additional Appointments by County Executive:* 1974 Charter contains modifying language "upon consideration of recommendations of the veterans' service agencies in the county", which is not contained in the 1972 Charter, Section 2105.

ARTICLE XXIII—GENERAL PROVISIONS

Section 2303 *Civil Service rights Continued; Status of Certain County Offices previously Appointed; Removal of Certain County Offices hereafter Appointed:* 1974 Charter omits 1972 provision for removal of County officers, appointed by the County Executive for a definite term, who are subject to confirmation by the County Legislature, requiring a hearing by a bi-partisan board of review consisting of five members of the

County Legislature appointed by its chairman, and a majority vote of the board of review to effect the removal.

Section 2304 *Classified Service, Exemption:* 1974 Charter provides for different itemization of divisions within the executive branch.

Section 2305 *Filling Vacancy in Elective Office . . .*: 1974 Charter has different enumeration of elective County offices coming within the purview of the Article.

Section 2306 *Filling Vacancy in Office of County Executive:* 1972 Charter provided a specific section on filling vacancy in County Executive office; the 1974 Charter provides for filling of vacancy under general provision of Section 2305 by following Section 400(7) of the County Law.

ARTICLE XXIV—APPLICATION OF CHARTER

Section 2407 *Charter Review Board; Establishment; Members; Term:* 1974 Charter specifies the constitution of the Charter Review Board—seven legislatures and five lay persons; no similar provision in the 1972 Charter.

APPENDIX 4.

Department of State Letters Confirming Filing of Charters.

Mario M. Cuomo
Secretary of State

Maurice Flasterstein
Administrative Director

(Seal)

State of New York
DEPARTMENT OF STATE
162 Washington Avenue
Albany, New York 12231

March 3, 1975

Laverne S. Graf, Clerk
Niagara County Legislature
Court House
Lockport, New York

Dear Sir:

Please be advised that Local Law No. 3 of 1974 of the County of Niagara was received and filed on February 28, 1975.

We enclose herewith additional forms for the filing of local laws for your future use.

Very truly yours,

BARRY F. BOHAN
Barry F. Bohan
Director
State Records and Law Bureau

cc: State Comptroller
Division of Municipal Affairs

G115-006

To: Co. Atty. 3/5/75

Appendix 4—Department of State Letters Confirming Filing of Charters.

Received
Mar 5 1975
Niagara County
Attorney

Mario M. Cuomo
Secretary of State

Maurice Flasterstein
Administrative Director

(Seal)

State of New York
DEPARTMENT OF STATE
162 Washington Avenue
Albany, New York 12231

February 28, 1975

LaVerne S. Graf, Clerk
Niagara County Legislature
Court House
Lockport, New York

Dear Sir:

Please be advised that Local Law No. 2 of 1972 of the County of Niagara was received and filed on February 28, 1975.

We enclose herewith additional forms for the filing of local laws for your future use.

Very truly yours,

BARRY F. BOHAN
Barry F. Bohan
Director
State Records and Law Bureau

cc: State Comptroller
Division of Municipal Affairs

G115-006

APPENDIX 5.

Notice of Motion to Vacate Judgment.

(Same Title.)

This is a motion brought on behalf of the Town of Lockport and Floyd Snyder, intervening defendant-appellants, pursuant to Rule 60 of the Federal Rules of Civil Procedure, for an order vacating the judgment of this Court in the above proceeding entered on January 9, 1975.

The grounds of this motion are that the parties to the action, other than the intervening defendant-appellants, have by their actions rendered the judgment moot, and have by those actions precluded or attempted to preclude the intervening defendant-appellants from obtaining any meaningful relief as to the said judgment on the appeal presently pending to the Supreme Court of the United States.

PLEASE TAKE NOTICE, that this motion will be brought on for argument before this Court at 11:00 a.m., Tuesday, May 27, 1975

VICTOR T. FUZAK, ESQ.
Victor T. Fuzak
Attorney for Intervening
Defendant-Appellants
1800 One M & T Plaza
Buffalo, New York 14203
Telephone: 856-4000

Dated: Buffalo, New York, May 22, 1975

Affidavit in Support of Motion to Vacate.

(Same Title.)

State of New York,
County of Erie. } ss.:

VICTOR T. FUZAK, being duly sworn, deposes and says:

1. I am the attorney for the intervening defendant-appellants, Town of Lockport and Floyd Snyder. This affidavit is made and filed in support of an application by those parties under Rule 60 of the Federal Rules of Civil Procedure for an order vacating the judgment of this Court entered on January 9, 1975.

2. In connection with a motion by the intervening defendant-appellants filed on May 9, 1975 for an order staying the enforcement of the judgment and order of January 9, 1975, it was disclosed to the Court and to counsel for the intervening defendant-appellants that the Niagara County officials and New York State officials involved in the action have, with the stated concurrence of the plaintiffs in the action, determined not to proceed pursuant to the judgment of this Court entered January 9, 1975 by filing, certifying and implementing Niagara County Local Law No. 1 of 1972 or the so-called 1972 Charter, which were the subject of the action, but instead to attempt to file, certify and implement a Local Law purportedly adopted in a 1974 referendum which would put into effect a different proposed Charter. The effect of this action on the part of the other parties to the proceeding is to make the judgment of January 9, 1975 meaningless and to render the specific issue determined by that judgment, that is, the validity of the 1972 Local Law and proposed Charter, entirely moot. The effect also is to deprive the intervening defendant-appellants from obtaining any meaningful relief from the

judgment of January 9, 1975 through a reversal of that judgment on the pending appeal to the Supreme Court. Inasmuch as the parties to the proceeding have elected not to proceed in accordance with the judgment of January 9, 1975, and have elected not to attempt to place into effect and to enforce the proposed Charter purportedly adopted on the referendum in 1972, those parties have effectively removed any justiciable issue from the Federal Court and have effectively precluded the granting of the relief sought by this action and incorporated in the judgment of January 9, 1975 and any meaningful reversal of that judgment. By determination and election of the other parties to this action, the 1972 Charter has been abandoned.

The consequence of the actions of the other parties to this proceeding is reflected in the statement made in the affidavit of the Niagara County Attorney filed in connection with the intervening defendant-appellants' motion for stay, and verified on May 15, 1975. In that statement the Niagara County Attorney advised the Court and counsel that the parties are not proceeding pursuant to the 1972 Charter, but in fact are attempting to proceed pursuant to a new and different Charter purportedly adopted on referendum in November 1974:

> "The Election to occur in November of 1975 for the office of county executive has nothing to do with the 1972 Charter approved by this Court. Subsequent to the Court's judgment, the County of Niagara duly filed a Charter which was approved by the voters on the 5th day of November, 1974 and filed by the State of New York, and which is now the official document for the governance of the County of Niagara. Since the judgment of the Court in regard to the 1972 Charter relates to a Charter in the year 1972 and nothing more, this Court has ab-

solutely no jurisdiction to prevent the County of Niagara from having a Charter government or holding elections pursuant to the Charter which was passed in 1974."

3. It is apparent that the other parties to this proceeding take the position that submission of a new and different Charter to the voters in November 1974, and the purported approval obtained by the voters of that new and different Charter, has the effect of superseding and rendering inoperative and ineffective the proposed Charter purportedly adopted on referendum in 1972. As the Niagara County Attorney has indicated in his papers and in his oral argument on the motion for stay, the January 9, 1975 judgment of the Court in regard to the 1972 Charter relates to a nonexistent, unenforceable, and superseded Local Law which, even assuming the validity of the January 9, 1975 judgment, cannot be put into effect or relied upon as the official document for the governance of the County of Niagara. As also disclosed by the affidavit of the Niagara County Attorney, an application was made to the Court in this proceeding prior to the time of entry of judgment that the judgment apply not to the 1972 proposed Charter which was the subject matter of the proceeding, but instead, to the 1974 Charter which it was asserted was approved upon referendum in November 1974. As was pointed out to the Court by the Niagara County Attorney's letter of December 10, 1974 (attached to the affidavit of the Niagara Attorney verified May 15, 1975): "The 1974 Charter contains a provision which indicates that it supersedes any and all other prior Charters (see Article I, Section 101, 1974 Charter)." This Court refused to grant that application; the January 9, 1975 judgment was settled and filed to relate specifically and solely to the 1972 Charter.

This action was brought for the specific and express purpose of obtaining an order and judgment ". . . enjoining

and directing the defendants to accept proposition No. 5, the proposed Local Law No. 1, 1972, in relation to the adoption of a Niagara County Charter, and to file the same in their respective offices upon due service of a certified copy of an order of this Court to said effect", and directing that an election pursuant to the proposed 1972 Charter be ordered at the earliest feasible time (see Amended Complaint). During the pendency of this case, the parties took actions the effect of which were to destroy the 1972 Charter as an enforceable law regardless of whether this Court should provide the relief sought in the action or not. That action was the submission to the voters of a new and different Charter, which by its express terms would supersede any and all prior Charters, including the proposed 1972 Charter. It is apparent therefore that there is no justiciable issue before the Court and that the parties other than the intervening defendant-appellants have rendered the entire matter and this Court's judgment moot. The 1974 Charter and the governmental and referendum procedures relating to it were not, and are not, of course, in any way a part of the proceeding in this action. Accordingly, as both plaintiffs and defendants have advised the Court on the motion for a stay, the January 9, 1975 judgment has nothing whasoever to do with the 1974 Charter approved by the Court. The plaintiffs in this proceeding have taken no action to require the defendants to comply with the January 9, 1975 judgment by filing, certifying and implementing the 1972 Charter. On the contrary, by letter dated May 20, 1975, counsel for the plaintiffs specifically advises the Court as follows: "The plaintiffs do not object to the action of the New York Secretary of State and the County of Niagara to implement the 1974 Niagara County Charter." It is, of course, quite obvious that as drafted, proposed and now purportedly certified and filed, the 1974 Charter supersedes and totally negates the 1972 Charter, which in any event was never put into effect or acted upon.

4. Submitted with this motion is a brief memorandum of law confirming this Court's jurisdiction to vacate its judgment of January 9, 1975 pursuant to Rule 60(b) of the Rules of Civil Procedure, and establishing the necessity and propriety of that action on the grounds that the purported issue in the proceeding has been rendered moot and that the judgment of January 9, 1975 cannot, by reason of the actions of the parties themselves, be enforced or carried out. Accordingly, the intervening defendant-appellants respectfully request that the Court vacate the judgment filed and entered in this proceeding on January 9, 1975 and award costs to this Court and also with respect to the filing and prosecution of the pending appeal to the Supreme Court.

VICTOR T. FUZAK.

Subscribed and sworn to before me
this 22nd day of May, 1975,
Geraldine A. Stanczewski,
(Seal) Notary Public, State of New York,
Qualified in Erie County.
My Commission Expires March 30, 1977.

Answering Affidavit in Opposition to Motion to Vacate Judgment.

(Same Title.)

State of New York,
County of Niagara. } ss.:

MILES A. LANCE, being duly sworn, deposes and says:

1. He makes this affidavit in opposition to a motion to vacate a judgment of this Court dated January 9, 1975, establishing a charter adopted by the electorate of the County

of Niagara by referendum on November 7, 1972. This motion was made by attorney for plaintiff-intervenor. In contradiction to the moving papers, these respondents did, in fact, implement the 1972 charter by filing it with the New York State Secretary of State and that State official duly filed the same.

2. It is said that the judgment in question is absolutely moot and of no effect. We ask, if that is the case, why bother to make this motion? The answer has to be that movant believes that should the Court grant his judgment it will destroy the effect of the adoption and filing of the charter which was effective in 1974, and pursuant to which elections are being planned to be conducted. These respondents continue to reiterate that the only way the 1974 charter for the County of Niagara can be muted is by a separate independent action to disestablish it and by a request by plaintiff-intervenor for a stay in such a new and independent action. This district court has absolutely no jurisdiction to vacate a judgment that has no intrinsic prospective application.

3. Rule 60 of the Rules of Civil Procedure, particularly subdivision (b), allows only six grounds for vacating a judgment of this nature, none of which apply to the facts of this action. There is no prejudice to the plaintiff-intervenor by the continued existence of this judgment, but there could be prejudice to the respondents, Graf and Comerford, because if the judgment is vacated, plaintiff-intervenor would then claim that the 1974 charter is invalid and accomplish by indirection what conceivably they could not accomplish by a direct law suit involving the 1974 charter.

WHEREFORE, the answering respondents request that this motion be dismissed.

MILES A. LANCE.

Subscribed and sworn to before
me this 28th day of May, 1975
Margaret L. Chambers
Notary Public, State of New York
Qualified in Niagara County
My Commission Expires March 30, 1977

Supplemental Affidavit in Support of Motion to Vacate Judgment.

(Same Title.)

State of New York, }
County of Erie. } ss.:

VICTOR T. FUZAK, being duly sworn, deposes and says:

1. This supplemental affidavit is filed in order to bring to the Court's attention the Reply of the Niagara County defendants to the Jurisdictional Statement filed by the intervening defendant-appellants with the Supreme Court. Copies of this Reply were served upon deponent yesterday. A copy of the Reply is annexed to this affidavit.

2. We call the Court's attention to point III of that Reply in which the Court is advised that since the 1972 Charter has been "supplanted and superseded" by the purported 1974 Charter, it "would be a mere theoretical exercise having no legal consequence" for the Supreme Court "to decide this action". In other words, since the original parties to this action have destroyed the subject matter of the action, no justiciable issue remains, the judgment of this Court has been rendered meaningless, and successful appeal from the judgment by the

intervening defendant-appellants would provide meaningless and ineffective relief. As the Reply states: "The question before the Court in regard to the 1972 charter is now moot."

3. This admission and concession that this case has become moot by reason of the actions of these parties requires that the judgment of this Court of January 9, 1975 be vacated by this Court. It is clear that the original parties to this proceeding have misused and abused that judgment. It is clear that the original parties to this action are attempting to use the judgment as the basis for attempted implementation of a 1974 Charter, while at the same time putting the judgment beyond the reach of the Court on appeal through destruction of the subject matter of the action. This design and purpose is further confirmed by the affidavit of Assistant Niagara County Attorney Lance verified May 28, 1975 in which the statement is made: "This district court has absolutely no jurisdiction to vacate a judgment that has no intrinsic prospective application." In sum, the proceeding has become moot, there is nothing as to which the judgment of January 9, 1975 can apply, and that judgment should be vacated.

s/ VICTOR T. FUZAK.

Subscribed and sworn to before
me this 30th day of May, 1975
s/ Carole L. Zeiher
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1976

(Reply to Jurisdictional Statement not reproduced.)

Affidavit in Opposition to Motion to Vacate Judgment (Shedd).

(Same Title.)

State of New York, }
County of Erie. } ss.:

FRANCIS W. SHEDD, being duly sworn, deposes and says:

1. That he is the plaintiff-appellee in the above action and is the representative of the voters who were aggrieved by the refusal of the New York Secretary of State to certify the 1972 Niagara County Charter by reason of the provisions of Article 9, § 1(h)(1) of the N. Y. Constitution and § 33(7) of the Municipal Home Rule Law, after said proposed charter received a favorable vote of a majority of the voters in the geographic unit of Niagara County in the 1972 general election.

2. That the decision of the Niagara County Legislature to attempt to move forward with a County Charter form of government in Niagara County in 1974, while this action was pending and undetermined, was consistent with the will of the majority of the voters of Niagara County who expressed their preference for said form of county government in the general election of 1972.

3. That the decision of the N. Y. Secretary of State, upon the entry of the judgment of this Court on January 9, 1975, to certify both of the County Charters approved by a majority of the voters of Niagara County is consistent with said judgment and represents a compliance with the specific direction of this Court as to the 1972 Charter and a voluntary compliance as to the 1974 Charter.

4. The required steps to be taken by the local government officers in Niagara County to implement the 1972 County Charter is to conduct an election for Niagara County Executive and Niagara County Comptroller. The same election would be held pursuant to either the Charter adopted by the voters of Niagara County in 1972 or 1974 by a majority vote.

5. That the differences between the 1972 and 1974 County Charters are (a) the County Attorney is appointed by the County Executive in the 1974 Charter; (b) the Budget Office is accountable to the County Executive in the 1974 Charter. Otherwise, the two Charters are identical.

6. That the issue now raised by the motion of the intervenor defendant Town of Lockport has resulted from the omission of the County of Niagara to advise the Court of its intentions to request permission from this Court to hold the elections in question pursuant to the 1974 County Charter as a substantial, if not total, compliance with the judgment of this Court of January 9, 1975 which enforced the suffrage rights of the voters of Niagara County to a County Charter form of local government.

7. That the issue of the Charter implementation is not ripe since it will arise only upon the certification of the ballot positions to be filled in the 1975 general election by the N. Y. Secretary of State on August 21, 1975 in accordance with § 69 of the New York Election Law.

8. That in the interim your deponent will apply to this Court for permission to conduct the election pursuant to the 1974 County Charter on the ground that such an election is in compliance with the January 9, 1975 judgment of this Court.

9. That in any event, the motion of the intervenor defendant has no merit since the primary determination by this Court in the form of a declaratory judgment that Article 9, § 1(h)(1) of the N. Y. Constitution and § 33(7) of the N. Y. Municipal Home Rule Law are unconstitutional in violation of the equal suffrage guarantees of the Equal Protection Clause of the Fourteenth Amendment remain in existence and are capable of repetition, yet evading review. *Moore vs. Ogilvie*, 394 U.S. 814, 89 S.Ct. 1493 (1969). Therefore, there continues to be a justiciable issue of the constitutional rights of the voters of the State of New York under the Constitutional and statutory provisions in question.

FRANCIS W. SHEDD.

Subscribed and sworn to before me
this 2nd day of June, 1975.
George R. Grasser,
Notary Public, State of New York,
Qualified in Erie County.
My Commission Expires March 30, 1976.

APPENDIX 6.

District Court Decision and Order Denying Motion to Vacate Judgment.

(Same Title.)

Appearances:

Moot, Sprague, Marcy, Landy, Fernbach & Smythe (John J. Phelan, Esq., of Counsel), Buffalo, New York, for Plaintiffs.

Louis J. Lefkowitz, Esq., Attorney General, State of New York (Michael G. Wolfgang, Esq., of Counsel), Buffalo, New York, for Defendants Ghezzi and Levitt.

Samuel L. Tavano, Esq., Niagara County Attorney, Lockport, New York, for Defendants Graf and Comerford.

Hodgson, Russ, Andrews, Woods & Goodyear (Victor T. Fuzak, Esq., of Counsel), Buffalo, New York, for Intervening Defendants.

Intervenors Town of Lockport and Floyd Snyder have moved to vacate the judgment of January 9, 1975 allowing implementation of the 1972 Charter because Secretary of State Ghezzi has also certified the 1974 Charter.

After considering all the papers and oral argument, I conferred with Judges William H. Timbers and Harold P. Burke. They concur with my judgment that the motion to vacate should be denied. The reasons underlying intervenors' application are not, in the Court's opinion, within the purview of Fed. R. Civ. Proc. Rule 60.

So ordered.

JOHN T. CURTIN,
United States District Judge.

Dated: June 11, 1975.